U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] Public Copy

File: WAC-97-236-51171 Office: Vermont Service Center Date: JAN 10 2001

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF PETITIONER: Self-Represented

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that he had established a new commercial enterprise in a targeted employment area into which he had invested sufficient funds and which created 10 new jobs.

On appeal, the petitioner argues that he created a new commercial enterprise through the reorganization of an existing business, that the new enterprise is doing business in a targeted area, that he has invested over $500,000, and that he will soon meet the employment creation requirement.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
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> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
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> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000.

8 C.F.R. 204.6(e) states, in pertinent part, that:

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has

experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
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> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
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> (ii) In the case of a high unemployment area:
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> (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
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> (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

On the petition, the petitioner claimed to have invested in [redacted] Station located in [redacted] California. The petitioner submitted no evidence of the unemployment rate in [redacted] either initially or in response to the director's request for additional documentation. Therefore, the director concluded that the petitioner had not established that the unemployment rate in Huron, California was 150% of the national rate.

On appeal, the petitioner submits printouts from the EZ/EC Home Page, the Agency for Housing and Urban Development (HUD) website, and Internet Herald. The EZ/EC information indicates certain tracts in Fresno County have a high poverty rate but does not address unemployment statistics. The HUD information indicates the "Cities of Orange Cove" make up an "enterprise community" but does not specifically address Huron. Finally, the Internet Herald

article indicates that regions such as [redacted], [redacted], Bakersfield, and Stockton all have double digit unemployment rates. While Huron is located in Fresno County; Modesto, Bakersfield, and Stockton are all cities, not counties. Therefore, it appears the article is referring to the city of Fresno, not the county. In light of the above, the record still does not indicate the unemployment rate for the city of Huron or Fresno County.

The petitioner also notes, however, that the population for the three tracts in Fresno County discussed on EZ/EC Home Page is only 15,186. While the Home Page does not clearly indicate that Huron is located within those tracts, a review of the city of Huron's own website indicates that its population as recorded in the 1990 census was only 4,766 and that its current population is 5,867. As these numbers are well below 20,000, it appears Huron is a rural area. Therefore, the minimum investment amount for an investment in Huron is $500,000. However, as will be discussed in detail below, while the claimed business may be located in a rural area, the petitioner has not demonstrated that he has any ownership interest in this business.

A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . *which the alien has established* . . . ." (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

> (1) The creation of an original business;
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> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
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> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of

> full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

8 C.F.R. 204.6(e) states that:

> *Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is [redacted] Food Store, [redacted] Station [redacted], which the petitioner allegedly established on July 11, 1997.

The petitioner indicated on the petition that he had created a new commercial enterprise resulting from the reorganization of an existing business. In support of the petition, the petitioner submitted a report responding to an application for a title insurance policy, Sale Escrow Instructions, a letter from the escrow agent, California Sales and Use Tax Returns, and a one-page business plan.[1]

While the California Sales and Use Tax Returns and the Business License issued October 1, 1997, list the petitioner as the owner or agent of [redacted], the record does not indicate that the petitioner has completed his purchase of the business. The petitioner has not submitted the final sales documents. Moreover, the letter from the escrow agent dated December 30, 1997, indicates the petitioner's

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[1] The petitioner also submitted evidence of a business venture which resulted in the shipment of used clothing to Africa. As this business has no relation to the claimed new commercial enterprise identified on the petition and the petitioner does not claim that his involvement in this other business meets the entrepreneur requirements, this evidence is not relevant to the petitioner's eligibility.

money remains in escrow and that the sellers have not yet received a release from the State Board of Equalization which would allow the sale to go forward. Despite this explanation for the delay in the purchase of the business, all of the tax documents listing the petitioner as the owner or agent of [redacted] are addressed to the State Board of Equalization.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the petitioner continues to claim to have purchased [redacted] but provides no documentation that the sale has been completed. Even if the petitioner were to show that he now owns the business, a petitioner must establish eligibility at the time of filing. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), at 7. At the time of filing, the petitioner had no ownership interest in the business.

The petitioner claims to be restructuring the business by adding a car wash and laundromat. However, he has not demonstrated that he has taken any actions towards these goals. Moreover, as the petitioner has not resolved the inconsistencies regarding the ownership of his alleged business, he cannot establish that he owns and, thus, has the ability to restructure the business. Therefore, he cannot demonstrate that he "established" a new commercial enterprise as defined in the regulations.

Finally, while we will discuss each eligibility requirement below, the petitioner must necessarily fail each requirement because the record does not establish that the petitioner owns the business he claims to own. At the very least, he did not own it at the time of filing. Without a job-creating enterprise in which the petitioner might demonstrate an investment and job creation, he cannot qualify as an entrepreneur.

CAPITAL AT RISK

8 C.F.R. 204.6(e) states, in pertinent part:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by

assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j)(2) states:

To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading, and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

> (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
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> (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362, 5 (Assoc. Comm., Examinations, July 31, 1998).

Matter of Ho further states:

> Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. This petitioner's de minimus action of signing a lease agreement, without more, is not enough. Id. at 5-6.

The petitioner initially submitted what appears to be a wire transfer receipt from an unknown source to the petitioner documenting a transfer of $15,000 on July 17, 1997 and three requests for fund transfers from [redacted] Enterprises, Ltd. requesting the transfer of $15,000 in June 1997, an additional $15,000 on July 4, 1997, and a final $15,000 on July 10, 1997 to the petitioner's personal account at Wells Fargo Bank.

In response to a request for additional information, the petitioner stated he had invested $160,000 and submitted the escrow agreement, a letter from the escrow agent confirming the petitioner had complied with the escrow agreement and that his money remained in escrow, a one-page business plan, cashier's checks purchased by the petitioner issued to [redacted] Food Store totaling $45,000 and to Town and Country Escrow for $6,074; wire transfer receipts documenting transfers of $10,000 each from [redacted] Enterprises to the petitioner on August 4, 1997, August 22, 1997, September 16, 1997,

and October 9, 1997; 1997 cancelled checks issued to [redacted] Food Stores for $40,000, and $4,000; and two cancelled checks issued to unrelated parties. The wire transfer receipts indicate the funds were deposited in the petitioner's personal account number [redacted] while the cancelled checks were all debited from account number [redacted] and are not preprinted with the petitioner's name.

The director, noting that the petitioner only claimed to have invested $160,000 and that the regulations require more than a mere intent to invest, concluded that the petitioner had not invested sufficient funds.

On appeal, the petitioner claims to have invested $455,000 as of 1997 and an additional $300,000 subsequently. The petitioner submits checks issued by [redacted] Food Store to the Employment Development Department, and 18 wire transfer receipts documenting the transfer of $174,667 total to the petitioner from various sources.

While the petitioner has documented funds being transferred into his account, he has not shown that he has received $500,000 and that $500,000 has been committed to the business. The Escrow Agreement indicates the petitioner paid $100,000 into escrow and would pay an additional $100,000 at closing, executing a promissory note for the remaining $850,000 sales price. As stated by the director, a promissory note secured by the assets of the new enterprise cannot be considered invested capital under the regulations. Regardless, the petitioner has not submitted any evidence that he has completed the purchase of the business. Therefore, the escrow agreement and letter from the escrow agent do not establish that the petitioner has done anything other than place $100,000 in escrow. Even this money is not sufficiently at risk as the escrow agreement provides for a right of cancellation. Moreover, as the record demonstrates, should the seller fail to secure the necessary releases required for the sale, the sale cannot occur. As stated in the regulations, evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment is insufficient.

The record does not establish the purpose of the $45,000 in cashier's checks and $44,000 in personal checks issued by the petitioner to [redacted]. As the petitioner has not submitted an investment agreement and the record does not reveal that the petitioner has any ownership interest in the business, we cannot conclude that the money paid to [redacted] is invested capital placed at risk.

The petitioner has not established that any money contributed to the proposed business or set aside for the eventual purchase of the business was at risk at the time of filing.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petitioner must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
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> (iii) Evidence identifying any other source(s) of capital; or
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> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31,1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Matter of Izumii, supra, at 26. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner has submitted wire transfer receipts documenting the receipt of $274,000 from [redacted] Enterprises, [redacted] Ltd., and [redacted] Ltd. While the petitioner asserts this money represents payments on his partnership interests in companies abroad, the petitioner has not submitted any evidence of his interest in any of those companies. The petitioner has submitted evidence only that he and [redacted] are partners in M/s [redacted] Industries and [redacted] Import and Export. As none of the money

wired to the petitioner originated from these partnerships, the petitioner has not established the source of his funds. Finally, the petitioner has failed to submit five years of tax returns as required by the regulations.

EMPLOYMENT-CREATION

8 C.F.R. 204.6(e) states, in pertinent part:

> *Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.
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> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

8 C.F.R. 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
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> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

In support of the petition, the petitioner claimed to have three workers. The petitioner submitted none of the documents listed in 8 C.F.R. 204.6(j)(4)(i)(A) and merely provided a one-page business plan. The director determined that the petitioner had not established that he had hired or would hire 10 employees. On appeal, the petitioner claims to have five employees and submits Employer's Quarterly Federal Tax Returns, Form 941, for 1998 and evidence of payments made to the Employment Development Department.

Except for the first quarter of 1998, the Forms 941 are blank on line one where the number of employees is to be listed. The first quarter return lists three employees. The petitioner failed, however, to submit the attachments to this form listing all of his employees. The petitioner also failed to submit Forms I-9 or payroll records indicating the number of hours worked. Therefore, we cannot determine whether any of his employees are qualifying employees.

In addition, the petitioner claims to have purchased an existing business. Even assuming that claim to be true, as stated by the director, when a petitioner is restructuring an existing business, he cannot cause a net loss of employment. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998) at 5. Had the petitioner actually completed the purchase of this business, he would have to show the number of employees at the time of the purchase and that he created an additional 10 jobs. In this case, where the petitioner had not even purchased the business at the time of filing and has still not conclusively established that he now owns the business, he cannot establish that he has created new jobs as he has not established a job-creating enterprise.

Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra. Elaborating on the contents of an acceptable business plan, the decision states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products.

> It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

The petitioner's business plan indicates the property to be purchased contains a vacant portion on which the petitioner intends to build a car wash and laundromat. The plan also indicates the petitioner is looking for additional property on which to build a hotel. The plan does not explain the staffing requirements of the business, contain a timetable for hiring, or job descriptions for all positions.

On appeal, the petitioner asserts he will hire two full-time employees by September of 1999, another two by January 2000, and another one to three by May 2000. As stated above, the petitioner has not submitted any evidence that he has completed the purchase of the business. The petitioner has not explained how he will be able to create employment at this business when he has yet to purchase it. Therefore, his unsupported assertions that he will hire additional people is insufficient.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.